2004

Stanley B. Fieeiki v. Department of Workforce Services, Workforce Appeals Board and State of Utah : Petitioner's Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STANLEY B. FIEEIKI, Petitioner, v. DEPARTMENT OF WORKFORCE SERVICES, WORKFORCE APPEALS BOARD, and STATE OF UTAH, Respondents.	 Appeal No.: 20040368-CA Priority No. 7

PETITIONER'S REPLY BRIEF

Petition for Review of a Decision of the
Department of Workforce Services
Workforce Appeals Board of the
State of Utah

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Services, Workforce Appeals Board

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Petitioner,	:	
v.	:	
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INTRODUCTION

The instant case involves a situation of off duty misconduct by a law enforcement officer, a termination of employment, and a claim by that law enforcement officer for unemployment insurance benefits. Where the Court draws the line in a case of a law enforcement officer between off duty misconduct that is "in connection with employment" and off duty misconduct that is not "in connection with employment" will have implications for all law enforcement officers in the State of Utah. The Court's decision will also have implications for all public employees in the State of Utah and many private employees in the State of Utah. Thus, this case has far reaching ramifications for employees in positions which involve any public presence and any contact with the general public.

The issue in the instant case is not whether the Department of Public Safety should or should not have discharged Mr. Fieeiki. The issue is whether the Department of Public Safety's evidence as to why it to discharged Mr. Fieeiki satisfies the three elements of the just cause standard, Utah Code Annotated § 35A-4-405 (2) (a), Utah Administrative Code R994-405-202 (2001), so as to deprive him of eligibility for unemployment insurance benefits. Those three elements are knowledge, control and culpability.

This case concerns primarily the third element of the just cause standard; namely, culpability–were Mr. Fieeiki's off duty, off site, in the middle of the night, within the privacy of his own home, actions so "connected" to his employment and so "bad" that he brought about his own discharge and should not be rewarded with unemployment insurance benefits?; or, were his actions, while meriting some discipline or perhaps even a discharge, not connected enough to his employment and not harmful enough to his employer's rightful interests to deny him eligibility for unemployment insurance benefits? See Utah Administrative Rule 994-405-202 (1).

In the instant case, the Workforce Appeals Board argues that the Department of Public Safety's evidence met its burden to establish the three elements of a just cause discharge, including the element of culpability. Thus, the Workforce Appeals Board argues that the Administrative Law Judge's findings of fact are supported by substantial evidence. And the Board also argues that the Administrative Law Judge's application of the law to the facts was correct and was not an abuse of discretion.

On the other hand, the Claimant, employee Stan Fieeiki, contends that the Administrative Law Judge's factual findings on the issue of whether Mr. Fieeiki's actions on the night in question were "in connection with employment" are not supported by substantial evidence. Mr. Fieeiki also contends that the Administrative

Law Judge's application of the law of culpability to the facts was an abuse of discretion. Thus, Mr. Fieeiki submits that the Court should not uphold the Board's findings, conclusions or decision but reverse the decision and award unemployment insurance benefits.

The issues of fact included such issues as what exactly happened on the night in question, what did Mr. Fieeiki's wife do to provoke Mr. Fieeiki and whether Mr. Fieeiki was acting in self defense. Those are issues of fact subject to the highly deferential standard of review. Mr. Fieeiki does not seriously challenge the Administrative Law Judge's findings of fact as to what happened on the night in question. He does question the Administrative Law Judge's findings of fact as to the connection between his off duty, off site actions and his employment –whether Mr. Fieeiki's actions exposed the Department of Public Safety to any real harm of any kind.

ARGUMENT

Mr. Fieeiki agrees with the Board and court precedent that to challenge a finding of fact a claimant must marshal the evidence in favor of the finding in dispute and then demonstrate how that finding, when viewed in light of the whole record before the Court, is nevertheless not supported by substantial evidence. See Grace Drilling v. Board of Review, 776 P.2cd 63, 67-68 (Utah Ct. App. 1989), Kennecott v.

Utah State Tax Commission, 858 P.2d 1381, 1385 (Utah 1993) and the discussion in Point III of the Board's brief in opposition.

The Board correctly articulates the requirement of marshaling but misapplies it in the instant case. The question of whether the facts satisfied the just cause standard is not a question of fact; it is a conclusion of law.

Thus, what Mr. Fieeiki primarily disagrees with is the Board's methodology–its effort to apply the requirement of marshaling to the legal conclusion that the Department of Public Safety's evidence established that Mr. Fieeiki's actions were culpable and, therefore, that the Department satisfied the just cause standard.

POINT I. THE EMPLOYER'S EVIDENCE AS TO CULPABILITY WAS LACKING AND THE BOARD'S FINDINGS AS TO CULPABILITY ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Mr. Fieeiki does not dispute that after being awakened by his wife on the night in question, who was hitting/kicking him (R. at 31, 41,60), he struck her three times (R. at 43, 60).

The parties do not dispute that whatever happened on the night in question, happened only once, off duty, after hours, off premises and within the privacy of Mr. Fieeiki's home, with members of his own family, not involving any member of the public, not triggering any public awareness or media

notoriety (R. at 33, 46, 67). There is no need to marshal evidence in favor of this finding. Mr. Fieeiki does not dispute it, he accepts it.

What he disagrees with is whether these acknowledged facts were culpable–were his off duty actions "in connection with employment" and were they "harmful to his employer's rightful interests"? Were such actions culpable? That seems to be a conclusion of law.

Thus, where Mr. Fieeiki disagrees with the Board is in its application of the law of culpability to the acknowledged facts. And what is the law of culpability?

The Board is correct that the Utah Administrative Rules do contain a rule (R 994-405-207) which does not limit conduct that may be disqualifying to offenses which take place only during business hours or on the employer's premises. The Rule sets forth various factors which a Court is to consider in evaluating whether misconduct which occurs off duty and off site has a sufficient connection to the employee's employment to nevertheless be culpable (harmful to the employer's rightful interests). These factors include:

1. The offense must be something that is a subject of legitimate concern to the employer; or

2. The offense must be something that is a subject of significant concern to the employer; and

3. The acts must be something that would be detrimental to the employer's business; or

4. The acts must be something that would bring dishonor to the employer's business.

The Rule then lists several examples of what interests may be interests of legitimate and significant concern to an employer, such as honesty, trust, discipline, efficiency, employee morale and good will.

The employer bears the burden of proving that the employee's actions involved such interests and that the employee's actions destroyed or jeopardized such interests. Dept. of the Air Force v. Dept. of Employment Security, 786 P.2d 1361 and companion case at 786 P.2d 1366 (Utah App. 1990).

During the hearing before the Administrative Law Judge and in the appeal to the Workforce Appeals Board, the Department of Public Safety made several general allegations but offered little proof that Mr. Fieeiki's actions involved or jeopardized any such interests. I explain:

The Department of Public Safety called one witness, Fred Baird, who was not Mr. Fieeiki's supervisor, who testified that he had investigated hundreds of acts of misconduct involving police officers. R. at 36, lines 17-18. This agent testified that he had dealt with many officers against whom criminal charges had been filed. He testified that the Department had terminated many of such officers. R. at 36, lines 25-27. Apparently, the Department had not terminated all of such officers. The Department of Public Safety representative offered no testimony as to in how many of these terminations the Department had been able to establish that the criminal acts were on duty or off duty or in how many cases the Department had been able to establish that off duty misconduct satisfied the "in connection with employment aspect" of the culpability element of the just cause standard and, thus, thwart applications for unemployment insurance. Indeed, the Department of Public Safety witness testified he had not been involved in a case of domestic abuse with a child, R. at 35, lines 30-31. Other than establishing that Mr. Fieeiki's actions violated some Departmental policies, a fact not in dispute, R. at 35, lines 9-16, the Department witness did not articulate, much less prove, why the Department chose to impose the disciplinary sanction of termination instead of some less severe punishment and how Mr. Fieeiki's actions impaired any of the Department's

rightful interests. The Department did not offer any testimony from any fellow coworker. The Department did not offer any testimony from any supervisor. The Department did not offer any testimony from any manager. The Department did not offer any testimony from any administrator. The Department did not offer any evidence of any media report about Mr. Fieeiki's actions which might have been embarrassing to the Department. The Department did not offer any testimony from a member of the general public that its impression of the Department had been lowered by some public disclosure of Mr. Fieeiki's actions (which was never made). R. at 33, 46, 67.

The Department offered little evidence that Mr. Fieeiki's off duty actions jeopardized any of its rightful interests. Instead, the Department tried to rely on what it apparently believed was the self evident serious nature of the actions:

STATEMENT	**EMPLOYER'S EVIDENCE**	**EMPLOYEE'S COMMENTS**
"The conduct for which claimant was discharged was certainly connected with his work and of significant concern to his employer" (Respondent's brief at page 8)	Lt. Baird's testimony that Mr. Fieeiki's actions violated several Department policies. R. at 32.	No testimony from any Department representative, other than the investigator.

"Violation of the law by one charged with upholding the law is a subject of legitimate and significant concern" to the employer" (Respondent's brief at page 8)	Lt. Baird's testimony that Mr. Fieeiki's actions violated several Department policies. R. at 32.	No testimony from any Department representative, other than the investigator.
"When claimant purposely violated the laws of the State of Utah, he showed a blatant disregard for the employer's rightful interests" (Respondent's brief at page 8)	Lt. Baird's testimony that Mr. Fieeiki's actions violated several Department policies. R. at 32.	No testimony from any Department representative, other than the investigator.
"The employer's trust was breached" (Respondent's brief at page 8)	Lt. Baird's testimony that Mr. Fieeiki's actions violated several Department policies. R. at 32.	No testimony from any Department representative, other than the investigator.
"The employment relationship [was] so seriously damaged as to make termination inevitable and justifiable" (Respondent's brief at page 8)	Lt. Baird's testimony that Mr. Fieeiki's actions violated several Department policies. R. at 32.	No testimony from any Department supervisor, manager or administrator.
"The claimant's actions reflected poorly on the Department of Public Safety" (Respondent's brief at page 9)	Lt. Baird's testimony that Mr. Fieeiki's actions violated several Department policies. R. at 32.	No public disclosure. No testimony from any public or media representative.

"The claimant's actions were sufficiently serious to involve the degree of culpability required by statute" (Respondent's brief at page 9)	Lt. Baird's testimony that Mr. Fieeiki's actions violated several Department policies. R. at 32.	See below.
"The employer established by a preponderance of the evidence that the claimant engaged in culpable conduct that required his termination" (Respondent's brief at page 9)	Lt. Baird's testimony that Mr. Fieeiki's actions violated several Department policies. R. at 32.	See below.

And see, for example, the Department's arguments in its brief in opposition dealing with the element of knowledge. "He...knew or should have known that assault and domestic violence would be a matter of serious concern to his employer and could lead to his termination," Respondent's brief at 9, and "The Claimant knew that breaking the law and violating the Department of Public Safety's policy was adverse to his employer's interests." Respondent's brief at 11.

The Board makes all these conclusory statements but offers little specific proof from any witness competent to testify about such interests. To make the point even more precisely, consider the particular interests the Administrative Rule lists and examine the Department's evidence:

Honesty. The Department adduced no evidence that Mr. Fieeiki's actions involved dishonesty. The acts themselves did not involve an act of dishonesty. Mr. Fieeiki did not lie about his actions. He was straight forward about what happened. Mr. Fieeiki did not steal anything. He did not engage in any act of sexual immorality.

Trust. The Department adduced no evidence that because of Mr. Fieeiki's actions in an incident in his bedroom with his wife in the middle of the night, it could no longer trust Mr. Fieeiki. The Department adduced no evidence that the conduct was anything other than an isolated incident of poor judgment with no expectation that it would be continued or repeated. See Utah Administrative Rule 994-405-202. The Department adduced no evidence that Mr. Fieeiki did not have an established pattern of complying with the employer's rules so that this incident would likely not be repeated. See Utah Administrative Rule 994-405-202.

Discipline. The Department adduced no evidence that Mr. Fieeiki's actions disrupted or impaired the ability of the Department to maintain discipline among its employees. Indeed, the Department

adduced no evidence that any employees other than those in Mr. Fieeiki's immediate chain of command even knew about his actions.

Efficiency. The Department adduced no evidence that Mr. Fieeiki's conduct (or his retention) would have impacted the efficiency of Mr. Fieeiki in doing his job or the Department in performing its mission.

Employee Morale. The Department adduced no evidence that Mr. Fieeiki's conduct (or his retention) would have had any impact on the morale of Department employees.

Goodwill. The Department adduced no evidence that Mr. Fieeiki's actions cost the Department any goodwill. What we do know is that the officers who arrested the claimant came to his house in the middle of the night right after the events had occurred. Those police officers notified the employee's supervisor. That supervisor passed information onto Mr. Fieeiki's ultimate supervisor, the Commissioner of Public Safety. That was the only "public" which knew of the incident. There was no showing that the public became aware of what had occurred during the approximate 10 seconds in his bedroom on the night in question or that the public became aware of Mr. Fieeiki's arrest or charges. There was no showing that even if the public did become aware

of Mr. Fieeiki's misconduct, such lowered the image of the Department in their eyes.

In the instant case, the employer's evidence on how Mr. Fieeiki's off duty misconduct jeopardized his employer's interests did fall short of the mark.

As precedent, the Board cites to Clearfield v. Department of Employment Security, 663 P.2d 440 (Utah 1983). See Respondent's brief at pages 8 and 9. The crime in Clearfield involved clearly serious criminal conduct after hours and off premises. But the crime involved was sodomy, a sexual offense involving a non-family member, and public notoriety. And the officer in question was less than forthcoming about his misconduct. Based on the evidence presented, the Department found such actions (sodomy and mendacity) act had a serious adverse effect on the claimant's employer's rightful interests. This negative effect included (1) disabling the employee from continued effectiveness as a police officer; and (2) discrediting the police department and his ultimate employer, the City.

By contrast, in the instant case, Mr. Fieeiki's off duty, off site actions did not involve sexual immorality or lying, did not involve non-family members or any member of the public. They did not involve the use of a firearm. They did not involve alcohol or drugs. They did not involve injuries.

R. at 32. They did not involve any public notoriety. Did the Department adduce evidence that Mr. Fieeiki's off duty misconduct rendered him ineffective in his job or discredited his employer? No. Did the Department of Public Safety's evidence establish that Mr. Fieeiki's off duty conduct seriously impaired the interests Mr. Fieeiki was employed to further? No. The Department offered no evidence that Mr. Fieeiki's off duty actions jeopardized any legitimate interest of the Department. Speculation is not evidence. Fear of some remote harm is not evidence. The "fatal flaw" in the Department's evidence is not in its evidence as to what Mr. Fieeiki did. That is not in dispute. The fatal flaw is in its lack of evidence as to what Mr. Fieeiki's actions did to harm the Department's public image.

POINT II. THE BOARD DID NOT PROPERLY APPLY THE LAW TO THE FACTS.

Mr. Fieeiki is not trying to justify domestic violence in any form or deny that he did something morally and legally wrong. He did. Mr. Fieeiki became involved in an unfortunate incident with his wife in their bedroom, having no connection to his job. The issue is not whether he could have been or should have been fired. He did violate certain Department policies and the Department was justified in imposing some level of discipline. But the issue is whether his employer has adduced sufficient evidence to prove that his off duty

misconduct had some connection to this employment by exposing the Department of Public Safety to a serious threat of actual or potential harm. Mr. Fieeiki contends the evidence on these issues is lacking. Platitudes about self evident propositions are not evidence.

That the Department would discharge Mr. Fieeiki for such an act is not the issue in the instant appeal. What is at issue is whether Mr. Fieeiki's single off duty, off premises act was so culpable that he should be denied unemployment insurance benefits.

Thus, Mr. Fieeiki's concerns with the decision are, in reality, two fold:

1. There is little evidence to sustain a finding that Mr. Fieeiki's actions were culpable, as that term is defined by the Utah Employment Security Act and implementing regulations; and
2. Even if there was evidence to support a conclusion of some culpability, culpability is always a matter of degree and the level of culpability in the instant case does not justify denying Mr. Fieeiki eligibility for unemployment insurance benefits.

Most people who get fired have done something wrong on the job. But that does not mean they do not qualify for unemployment. Most do. City of Orem v. Christensen, 682 P.2d 292 (Utah 1984), Martin v. Dept. of Employment Security, 682 P.2d 304 (Utah 1984), Logan Regional Hospital v. Board of Review, 723 P.2d 427 (Utah 1986), Lane v. Board of Review, 727 P.2d 206 (Utah 1986). In some cases, on duty misconduct is so serious that the Court has upheld denial of benefits. See Rahimi v. Board of Review, 706 P.2d 1063 (Utah 1985), Grinnell v. Board of Review, 732 P.2d 113 (Utah 1987), Stegen v. Dept. of Emp. Sec., 751 P.2d 1160 (Utah Ct. App. 1988), Law Offices of David Paul White v. Board of Review, 778 P.2d 21 (Utah Ct. App. 1980), Nelson v. Dept. of Emp. Sec., 801 P.2d 158 (Utah App. 1990), Bhatia v. Dept. of Emp. Sec., 834 P.2d 574 (Utah App. 1992).

The issue, especially where the employee has done something wrong off the job, is always one of degree–is there any connection with the employee's employment and how "wrong" were the employee's actions? That is a matter of applying the law to the facts. Wright's Furniture Mill v. Industrial Commission, 707 P.2d 113 (Utah 1985).

The incident in the instant case involved some physical contact between husband and wife. It did not involve sex or money or drugs. Cf.

Johnson v. Dept. of Emp. Sec., 782 P.2d 965 (Utah Ct. App. 1989). It did not involve a member of the public. It happened in the middle of the night. It engendered no public notoriety. It was a first offense. It was an isolated error in discretion/judgment. It should not be disqualifying. Northwest Foods Ltd. v. Board of Review, 731 P.2d 470 (Utah 1986).

The Department of Public Safety may hold police officers to a higher standard. It may discipline, even terminate, employees who do something off duty and off site which violates Department policies. But if a law enforcement officer falls short of the standard on one occasion and gets fired, the Department still has to prove why and how such misconduct, especially off duty misconduct, jeopardized its rightful interests in order to deny eligibility for unemployment insurance benefits. It may be that a law enforcement officer's off duty misconduct may discredit a law enforcement agency. But the Department has to offer some evidence to that effect and prove that proposition. See, generally, Spartan AMC/Jeep v. Board of Review, 709 P.2d 395 (Utah 1985), Pro Benefit Staffing, Inc. v. Board of Review, 775 P.2d 439 (Utah Ct. App. 1989). In the instant case, the meager proof offered did not support a conclusion of culpability. The Department's factual evidence did not establish

culpability. The Board's decision on the application of the law of culpability to the facts was erroneous and an abuse of discretion.

CONCLUSION

The practical impact of the Board's decision is to adopt a per se rule that any off duty misconduct by a police officer satisfies the "in connection with employment" rule and the element of culpability and, thus, satisfies the elements of just cause.

Mr. Fieeiki believes the Court should avoid adopting such a rule for two reasons: (1) a per se rule would abdicate judicial responsibility of determining fact intensive cases on a case-by-case basis, Continental Oil Co. v. Board of Review, 568 P.2d 727 (Utah 1977) (culpability requires a finding of a deliberate, wilful or wanton disregard by the employee of the interests of his employer); and (2) would emasculate protection to employees who have engaged in some act of off duty misconduct with little or no connection to their employment and render them without the protections of the unemployment insurance safety net. Martin v. Dept. of Emp. Sec., 682 P.2d 304 (Utah 1984).

Mr. Fieeiki urges the Court to reverse the denial of unemployment insurance benefits.

DATED this 27th day of April, 2005.

David J. Holdsworth
Attorney for Petitioner Stanley B. Fieeiki

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2005, two true, correct and complete copies of the foregoing PETITIONER'S REPLY BRIEF was delivered upon the party(s)/attorney(s) indicated below by the method(s):

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